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DECLARING STATUTES OF CONGRESS VOID.

Every modern state sets apart a body of men to make the "laws" and relies for the execution of these laws, on another set of men. This circumstance secures to the latter the power of nullifying the law by refusing to perform the actions necessary to enforce it. The causes for this refusal might be various, *e. g.*, want of sympathy with the ends contemplated by the law, or jealousy of the law-making body, or a belief that the law is inconsistent with the Constitution. If many executive officers were disposed to accept orders from the president or other chief executive officer an intimation from him, openly or secretly, that he did not want the law carried out, would reduce it to ineptitude. Certain executive acts, *e. g.*, those of a marshall or sheriff in execution of the judgment of a court, are performed only in obedience to a court. The court's refusal to honor the act of congress by giving the necessary judgment and issuing the execution, would secure the refusal of these officers to lend assistance to it.

Now, it is quite evident, that the constitution which separates the legislative from the executive power becomes unworkable if those who wield the latter are unwilling loyally to execute the legislation of the former. Law without enforcement is vain. In the United States, the executive officers, even the highest, have put forth no pretension that they may for any reason, refuse to carry

out a statute. The person who is president when a bill is passed, has a veto upon it, but when, in the forms of the constitution, it becomes law, neither he nor his successors claim the right to deny enforcement to it because, in their opinion, it exceeds the constitutional power of Congress.

The courts, however, who are a part of the executive machinery of the country, have refused to cooperate in the execution of a law except under the condition that it is, in their opinion consonant with the constitution. They do not pretend that they may thus annul it, because they do not agree with congress with respect to its wisdom or its justice. They say, however, that they are not concluded by the opinion of congress as to its conformity with the constitution and that forming their own judgment on this point, they may not merely decline to assist in, but may actually prohibit or penalize, the execution of it, should that judgment be adverse.

It is not pretended that the constitution confers this power on the courts in explicit terms. It bestows on them judicial power, just as it bestows on the president and the various executive officers, high and low, the executive power. Their work is simply a section of the work of execution. When the president does certain things in the carrying out of a law, he must decide whether it is a law. He has sworn to support the constitution. There is always a possibility that the law transgresses that instrument. But he does not arrogate a power to ignore the statute on his own personal view of its constitutionality. Inferior executive officers, e. g. the heads of the departments, collectors of internal revenue, collectors of the ports, marshalls, are equally modest. It does not occur to them to refuse obedience to a statute because they think it void. Yet they are bound to obey the constitution, and, if an unconstitutional law is no law, if it confers no rights, confers no duties, affords no protection[1] it would seem that they are as much justified in refusing to carry out any law until, comparing it with the constitution, they have convinced themselves that it is valid, as is a court which is engaged in the task of execution but at another stage.

There is, however, this remarkable difference between the court and the other executive officers. If the latter carry out a law, and a court should later declare it void, they may be punished

[1] Norton v. Shelby County, 118 U. S. 425.

as tort-feasors, possibly as criminals; and if, fearful that it is unconstitutional, they refuse to carry it out, and the court should afterwards hold it valid, they may again be punished for tort or crime, whereas, courts in carrying out or in refusing to carry out statutes, have contrived to escape this responsibility. The citizen, the executive officer, must act at his peril. There is no way by which he can learn in advance, whether the law is sound or unsound. He must heed it, or disregard it, and in either case, possibly incur a heavy liability.

Enjoying this perfect impunity which they have invented for themselves, courts may refuse, without risk, to enforce statutes, on the pretence that they do not think them constitutional.

There are four general ways in which courts might exert their power of declaring acts unconstitutional. (a) They might declare bills unconstitutional before their transition into "law." (b) They might prevent the execution of the law by injunction, mandamus, *habeas corpus*, or other process directed to an officer, or an unofficial person. (c) They might entertain suits for damages for acts done by officers or others in pursuance of an unconstitutional statute. (d) In suits by A to enforce a right granted by a statute, or in suits by A, in which the state furnishes B, the defendant with a defence, they might decline to recognize the right or the soundness of the defence.

The Constitutional Convention of 1787 made the President a part of the law making body by requiring the submission of every bill to him. It expressly declined to require the report of a bill to the judiciary for its approbatory action. This, probably, was the result of their unwillingness to allow courts in any form to have the power to sit in judgment on the propriety of statutes. It could hardly have been their thought that the judgment of the judges to whom a bill was submitted, should not be conclusive upon their successors on the same bench, and that for this reason, it would be comparatively useless to require those who happened to be on the bench at the period of the enactment, to partake therein. It is incredible that the framers of the Constitution contemplated the possibility that one set of judges might denounce a law as void, and a later set affirm its validity, and a still later set revert to the attitude of the first. But on the other hand, it is difficult to understand, if the members of the convention intended the judges once to express a judgment on the law, why they did not provide for this expression at its initiation.

Is it said that it is better that the opinion should be expressed in the ordinary course of litigation? The objections to this method are serious. Instead of some public agency eliciting the judicial opinion, it would be a private litigant. Years may elapse before the case is made and meantime the statute has seemed to be law and has been widely submitted to as law. The counsel employed, may inadequately attack or defend the statute. The decision will bind nobody else than the parties, not even the court. The same question may be recontested as often as enterprising suitors or lawyers choose, and there may result a series of inharmonious decisions from the same court. The same act has in fact been declared void [1], and, in a later suit, valid, and after acts involving a certain principle have been repeatedly held valid another involving the same principle has been denounced as void.[2]

It may be true that the unconstitutionality of an act may not be discoverable until a searching analysis of its provisions has been made and the various possible results of their applications have been realized, and that this is impossible by the imagination alone. But, the logical result of this consideration would be that a statute may be obeyed by citizens or enforced by executive officers and by courts, for years before its unconstitutionality may be discerned The number of questionable statutes is always extremely small, and it would be possible to secure a reasonably thorough sifting of them before they were allowed to become ostensible law by the aid of jurists appointed for that purpose. The expense would be insignificant, in comparison with the loss occasioned by the present method.

A so-called preventive jurisdiction exists in the courts, that which is exerted by means of an injunction, or a writ of prohibition. It would not be irrational to extend this method to the enactment of statutes believed by a suitor and by the court to be unconstitutional. If X is aware of the pendency of a bill in Congress which will seriously affect his interests and which he believes to be unconstitutional, why may he not file a bill in the court asking that officers of congress concerned in the legislation, be enjoined from promoting it?

The very suggestion of such an injunction will doubtless seem absurd. It seemed absurd to the mind of Chief Justice Chase when he said "it will hardly be contended that the court can interfere to

[1] Legal Tender Cases.
[2] The Income Tax Cases.

restrain the enactment of an unconstitutional law"[1] and Harlan J., says [2] that even in enjoining the councils of a city from passing unconstitutional ordinances, the courts will "pass the line that separates judicial from legislative authority. The passage of ordinances by such bodies are *(sic)* legislative acts which a court of equity will not enjoin."

But, the courts will forbid B's doing an act which he is commanded by A to do. It will sometimes forbid A's commanding him to do it. But, what is legislation but A's command to B, C, D, E, or F? By supposition, the legislative body has no right to enact the law in question. Its perogatives would not be infringed by a court's forbidding it to do what the people in their constitution, have already forbidden it to do.

To say that the act is "legislative" as does Harlan, J., and therefore will not be enjoined is to say nothing. It is not legislative if it is void, and why cannot an illegal legislative act be forbidden, as much as an illegal executive act? The former leads to the latter. If the commanded effect may be prevented, why may the command to produce the effect not be prevented? Only those who take words for things can see the reason.

Will it be said that the number of legislators to be enjoined will be great? It will. If the end to be gained is important enough how can this matter? Is an important right to be left defenceless because of the mechanical inconvenience of the proposed method of securing it?

The real objection is far different. The courts have been conscious that their power to declare acts of congress void, has not been always acquiesced in by members of congress. They were obliged to begin cautiously and in ways that did not provoke resistance. Had they attempted to forbid the legislators themselves, the latter might, probably would, have defied them. A method less beneficial to the public but more likely to spare the court from discomfiture, was hit upon. A case between private persons involving the constitutionality of an act of congress may not be made up for years. The congress that enacted it is no longer in power. If it is, it has lost its interest in the question. It does not feel as keenly a judgment of annulment, obtained in this obscure way, as it would, had it been made a party defendant, and had the court launched against

[1] Mississippi v. Johnson, 71 U. S. 475.

[2] New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471.

it its compulsive order. Though at first a little startled by the assumption of the right to annul statutes, the country and congress have grown used to it. Had the more direct, the bolder and the more honest method been employed at first, the experiment would probably have been fatal to the court, and it would have failed altogether to acquire the power which by its prudence it has now consolidated.

Had it been clear that the constitution makers really intended that the courts should have the power to annul acts of congress it would be derogatory to the latter to impute to it an unwillingness to submit to the tutelage of its mentors. An unconstitutional law ought not to be enacted. The edict of the court would save the innocent and ignorant legislators from the commission of a blunder which, disparaging their own constitutional sense, would also be disastrous to the millions of people who would seem to be affected by it. It is to be presumed that congress has perspicacity enough to discern that it is in fact as much humiliated when its executive agents are forbidden to carry out its statutes, or are mulcted in damages because they have carried them out, as it would be, were its attempt arrested to give the apparent virtue of law to its bills. Its honor would welcome the latter inasmuch as innocent humble executive officers and citizens would in that way escape being made to suffer vicariously for it.

It is suggested that for the court to enjoin the enactment of laws by congress, would be for it to assert a superiority over congress. So it would. But, that is precisely what the court must assert when it declares in any form an act of congress void. How can it matter, so far as coordinateness or subordinateness is concerned, whether the court prevents the passage of the statute, or brands it, passed, as void, and both refuses itself, and forbids citizens or executive officers, to give the statute obedience? The arrogation of superiority is the same in both cases. What does congress gain by being allowed to "pass" an act, if, as soon as it is passed, execution of it is paralyzed by prohibitions, pains and penalties?

Indeed, the courts have themselves occasionally perceived that to refuse execution to an act of legislation is substantially the same thing as to restrain the enactment itself. In Cherokee Nation v. State of Georgia,[1] the Nation filed a bill in the Supreme Court

[1] 5 Peters, 1; quoted approvingly in Georgia v. Stanton, 73 U. S. 50.

against the governor of Georgia, the attorney-general, the judges, etc. to forbid their carrying out statutes whereby Georgia extended its jurisdiction over the lands and the persons and property of the Indians. Declining to entertain it because the plaintiff was neither a state nor a foreign state, Marshall, C. J., remarks, as an additional objection, that "it seeks to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the state denies * * * * The bill requires us to control the legislature of Georgia and to restrain the exertion of its physical force."

"It will hardly be contended" says Chief Justice Chase[1] "that the court can interfere in any case, to restrain the enactment of an unconstitutional law, and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident, and the execution of that purpose certain, be distinguished in principle, from the right to such interposition against the execution of such a law by the President?" As prohibiting execution by the President is only a somewhat more comprehensive and complete prohibition than that of minor executive officers, this remark, if it means anything, must mean that, to prevent execution is as objectionable as to prevent enactment, of a statute. It surely is, but the logical result ought to be that, if the court cannot do the latter, it cannot do the former.

Is it suggested that congress would at this day disobey the court's injunction, and the latter would be powerless to enforce submission? Several answers are possible. (a) For nearly 90 years, Congress has witnessed with meekness the assumption by the court of the power to declare its legislation void. It apparently concedes the right of the court thus to do. If it does, it could have no particular motive to object to the prompter, and to the public more advantageous, method of preventing the improper enactment. To suspect that, resignedly acquiescing in the annulment of statutes enacted, it would resist the attempt to prevent it from enacting them, is to impugn its good sense. It can surely attach no importance to the right of voting a law into being, which is instantly to be stricken by the courts with death. (b) If the court really has the power to prevent the passage of a void act, it would be to impeach the patriotism of congress, to believe it capable of resisting

[1] Mississippi v. Johnson, 71 U. S. 475.

the exercise of it.[1] (c) The disobedience of the injunction would be immaterial, for the court would have condemned the law, and citizen and officer would know in advance that it was void.

It is deeply to be regretted, since courts will pronounce acts of congress void, that they have not arrested them before promulgation as law. Once enacted, they seem to cast duties on citizens and officers. Loss and risk are absolutely inevitable, if their fate in the court is at all doubtful, whether they shall be subsequently sustained or not, for some citizens will conclude that they are good, others that they are bad, and will behave accordingly. But there is no likelihood that the method that would minimize the mischief caused by declaring acts unconstitutional, will now be adopted. The losses incident to the methods in vogue do not fall upon the court, and citizens must accept such as fall on them as the inevitable consequences of living under the only government that allows its courts to set at naught acts of legislation that have passed with all constitutional forms.

The courts will not renounce the power of declaring acts of Congress void. They will not prevent the formal enactment of them. It follows that they must, in some way, arrest their execution. One way of arresting the execution of a statute, would be to enjoin the officer who was about to execute it. Certain acts require the agency of the President. In certain contingencies his aid may become necessary in any case; even that of carrying out a judgment of a court. If the court should enjoin the President from carrying out a statute it would more effectively, more quickly, over a wider area, arrest it than in any other way. Will, then the court enjoin the President?

In Mississippi v. Johnson[2] an attempt was made to prevent the execution within Mississippi of the Reconstruction Acts, by a bill filed in the Supreme Court against Andrew Johnson, president, and Gen. E. O. C. Ord, commanding in the military district. The court refused to entertain the bill for reasons, three in number, that are noteworthy.

(a) The work of the president, it was said was "executive," and not "ministerial." No specific acts were required to be done

[1] Something similar was said by Davis, J., of the President, when it was suggested that he had probably hung Miligan in execution of the sentence of a military court, despite his appeal on *habeas corpus* to the Supreme Court; *Exparte* Miligan, 71 U. S. 2.

[2] 71 U. S. 475.

by him. He had discretion. The court could not displace his discretion by its own. The answer to this was easy. If the Reconstruction Acts were constitutional, the president did indeed have a discretion. Numberless alternative acts would have fulfilled his duties under them. His was the power of selection. But, what if these acts of Congress were void? Then he had no discretion. The only authority for doing any of them was they. Without them, any act by him of the sort about to be attempted, would have been illegal. He had the physical power to do it, but so has a murderer to kill, or a thief to steal. The act being unconstitutional, he had no discretion. To the suggestion however, that the court was not asked to enforce action "but to restrain such action under legislation alleged to be unconstitutional," the reply vouchsafed by the Chief Justice is "But we are unable to perceive that this circumstance takes the case out of the general principle which forbids judicial interference with the exercise of executive discretion." The Chief Justice could not see a difference between having a right to effect a certain end, by means freely chosen, and having no right to effect that end by any means at all!

Suppose an unconstitutional tax law, giving to the taxing officer the choice of means to compel the payment of the tax. He would have a discretion, were the law valid, of which no court could deprive him. But the law is void. Would the court refuse to enjoin him against collecting the tax, because he had a "discretion?" He has no discretion. His duty is to refrain from anything done to enforce the payment of the tax. It was Andrew Johnson's duty to refrain from doing anything towards the enforcement of the Reconstruction Acts, if they were unconstitutional.

(b) The next reason assigned by C. J. Chase is equally remarkable. In eighty years, he says, no injunction against the president had been asked for, and he makes the puerile suggestion that during the agitation for the annexation of Texas, there would have been motive to seek an injunction, had it been believed practicable, but "no one seems to have thought of it." No other occasion for desiring to enjoin the president is mentioned. Is it not enough to reply to this logic, that every kind of thing is once done for the first time; that annexation is a "political" question with regard to which the courts disavow the desire or power to differ from the "political departments" so that for this reason, lawyers knew that the bill if filed would be unsuccessful,[1] and that the supposition that

[1] Foster v. Neilson, 2 Peters, 253; Jones v. United States, 137 U. S. 202.

the failure of somebody to file a bill in 1845, is proof, not only that no body then believed the possibility of sustaining such a bill, but that what no body then believed possible was then, and is now impossible, is in the last degree fatuous.

(c) The last reason of the Chief Justice is still more remarkable. The court, he suggests, cannot restrain the enactment of a law, "and yet" he asks, how can the right to do this "be distinguished in principle from the right to such interposition against the execution of a law by the President?" To enjoin the President from executing a law is the same thing as to enjoin Congress from passing it. This statement is far from self-evidencing, and the *ipse dixit* of the justice is its only warrant. But what does it mean? That injuction against carrying out a law is not permissible? Injunction has been repeatedly employed as a means of preventing the carrying out of a void law, and has been directed against a collector or other agent employed in assessing or collecting taxes [1] against a city, to prevent the taking of land under an unconstitutional ordinance [2] against a corporation to prevent its voluntarily paying an income tax [3] and in other cases. If an officer is to be liable if he enforces an unconstitutional statute it is surely preferable that he should be prevented from, rather than penalized for, executing it.

The court, the Chief Justice doubtless intends to say, cannot enjoin the President in any case. But why? The first reason given is that it would be equivalent to enjoining Congress. This is somewhat recondite. The two are not the same. The latter legislates, the former presides over execution. But in essence, what difference is there between enjoining an inferior executive, and enjoining a superior executive? The object in both is to prevent enforcement of the law. If that is a worthy object, is it right to realize it partially and wrong to realize it fully? Right to prevent execution at one or two or six places and occasions, but wrong to prevent it at all places and occasions?

The second reason assigned by the Chief Justice is that the President, Congress and the judiciary are co-ordinate and distinct departments. But as legislative power exists in order that effects may be produced, and as these effects are produced not immediate-

[1] Union Pacific Railway Co. v. Ryan, 113 U. S. 516;

[2] Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207; Dobbins v. Los Angeles, 95 U. S. 223;

[3] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 602.

ly by Congress but by the executive department, of which the courts are a branch, the courts in forbidding even inferior officers or citizens from executing statutes, or in refusing, in suits before them, to give effect to duties or rights defined by statutes, are asserting a superiority to Congress. It is puerile to suppose that the attempt to enjoin the President is a worse invasion of his rights or the rights of Congress, than the injunction of inferior officers through whom both Congress and the President are to realize their objects.

The third reason is equally notable. Suppose the President refuses obedience to the injunction. The court cannot fine and imprison him. He is too strong to be subject to punishment; therefore he cannot be the subject of an injunction. To this it may be replied: since the court is *ex hypothesi* the judge of constitutionality, and since the President knows that it is, it is injurious to him to suppose that he would disobey the court. To do so is to accuse him of lawlessness. The advice of the court would doubtless be welcomed by him, and he would obey it with alacrity. But, if he obeyed, replies the Chief Justice, he might be impeached by Congress. But is not that insinuation injurious to Congress? Does not Congress know that the court is the final judge of constitutionality? And is it so anarchic, that it would punish the President with deposal for obedience to this sovereign court? And why should it direct its batteries against the President, conscious as it would be, that the court, not he, was the prime offender? But if, as experience shows, congress submits gracefully to interference by the court with the execution of its laws, when the president's agency has not intervened, why should it be specially angry, because the court in some particular case, accomplishes this nullification, by putting the president in subjection to its behest?

Precisely how exalted the officer must be, to exempt him from the court's injunction, we do not know. Next below the president are the members of the cabinet, but it seems not to have been doubted that they could be compelled to do, or to refrain from doing, things by an order of a court. That the secretary of state,[1] the postmaster general,[2] the secretary of the interior,[3] the secretary of

[1] Marbury vs. Madison, 1 Cranch 137.
[2] Kendall vs. United Stats, 12 Peters 617.
[3] United States vs. Schurz, 102 U. S. 378.

the navy,[1] the secretary of war[2] the secretary of the treasury[3] are subject to mandamus, when the thing to be done is not discretionary is clear. It was affirmed that Madison, secretary of state under President Jefferson could be compelled to deliver a commission, although the secretary was acting under the order of the president in withholding it. What would the court have done, if any of these great officers had refused obedience to the court's command? The postmaster general by an order could cause or defeat the execution by thousands of his subordinates of an unconstitutional law, and it would be highly convenient to the people where the law is unconstitutional, to have its execution arrested simultaneously everywhere, by means of an injunction addressed to him. In Georgia v. Stanton,[4] a second effort was made by the state to prevent the execution of the reconstruction acts, by enjoining the secretary of war from assisting in carrying them into execution, but again the court escaped a decision upon the law, not however by holding that secretary Stanton was too big an officer to be enjoined, but by the principle that as the defense only of political and not property rights, was sought by the bill, equity could not give relief. The court was determined to avoid a collision with Congress.

The propriety of forbidding an act by a superior officer on which depends the efforts of many inferior officers, to carry out an unconstitutional law, has been more than once recognized. In Fargo vs. Hart,[5] an injunction to the state auditor, forbidding his certifying assessments of taxes on the property of an express company, to the auditors of the various counties of the state, on the ground that the assesments were unconstitutional, was justified by Holmes, J., by the consideration that "It avoids the necessity of suits against the officers of each of the counties of the state."

The timidity of the court with regard to its ability to enforce its orders has doubtless been confirmed by certain disagreeable experiences. In Worcester v. Georgia,[6] it reversed a conviction of Worcester under a state statute by a state court, but fearful that

[1] Decatur vs. Paulding, 14 Peters 497.

[2] United States vs. Lamont, 155 U. S. 308.

[3] United States vs. Windom, 137 U. S. 636.

[4] 73 U. S. 50

[5] 193 U. S. 490. Cf. Adams Express Company vs. Ohio State Auditor, 165 U. S. 194.

[6] 6 Peters, 515.

its own officers would be powerless to secure the liberation of the defendant, remitted the record to the state court with a direction to that court to liberate him. That court refused, and since military power would have been necessary to compel obedience, and since President Jackson was unwilling to lend such power, the judgment of the court was successfully defied.[1] In other cases, Georgia had hung two men, pending a writ of error from the Supreme Court, which was a supersedeas.[2] Shortly before the Civil War, Kentucky applied to the Supreme Court of the United States for a mandamus upon Dennison, governor of Ohio, to compel him to surrender a fugitive from justice. The crime had been persuading a slave to escape. In order apparently to avoid having to grant the mandamus, when it would certainly be defied, the court came to the preposterous conclusion that when Congress, in the act of 1793, declared "it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured * * * and to be delivered up," the duty thus declared was not a legal duty, nor could it be enforced even by a mandamus.[3] In Marbury v. Madison,[4] after roundly lecturing Jefferson, President, and Madison, Secretary of State, Chief Justice Marshall skillfully avoided launching the mandamus, by the opportune discovery that the original jurisdiction of the Supreme Court could not be enlarged by Congress. Instead of dismissing the case as he should have done for want of jurisdiction, he seized the opportunity to condemn the action of the executive without incurring the risk of defiant disobedience.

A still more flagrant case of timidity is that of *Ex parte* McCardle.[5] McCardle had been arrested by military authority, in Mississippi, for libel, under the Reconstruction acts. These acts subjected him to trial by a military court. He applied for a *habeas corpus* to the Circuit Court of the United States, which remanded him to military custody. He appealed to the Supreme Court of the United States. The court was urged to dismiss the appeal for want of jurisdiction. It announced that it had jurisdiction and heard the cause on the merits. "The majority of the Supreme

[1] Baldwin, The American Judiciary, p. 294.

[2] Baldwin, The American Judiciary, p. 164.

[3] Kentucky v. Dennison, 24 Howard, 66; Baldwin, The American Judiciary, p. 296.

[4] 1 Cr. 137.

[5] 73 U. S. 318.

Court" says Foster [1] "held that at least so much of the act was unconstitutional as deprived citizens of the United States of the right of trial by jury." Did they liberate McCardle? Congress was in no mood to brook the nullification of its Reconstruction policy. It might resort to impeachment should the court oppose its plans. "The court," says Foster, "hesitated to engage in a conflict with a co-ordinate department of the government upon a question of so great a political importance, and consequently, against the protest of two of their number,[2] postponed their decision until the succeeding term, *in order to* afford Congress an opportunity to repeal the statute that gave them jurisdiction." The statute was accordingly repealed, and McCardle was left exposed to an unconstitutional conviction, although the court had had the power for a whole year to liberate him as it believed he should be. An astonishing feature of this case is the disingenuous and callous remark of Chief Justice Chase, in dismissing the appeal. "It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal, and judicial duty is not less fitly performed by declining ungranted jurisdiction (that is jurisdiction which, once granted, has been withdrawn upon private suggestion to congress from the court) than in exercising firmly (!) that which the constitution and the laws confer."

This suspicion of the courts, that their power of declaring acts of congress unconstitutional would, if exerted too directly upon Congress or the President, cause them embarrassment, has unfortunately induced them to resort to more covert, and for citizens, less desirable methods of annulling statutes. The existing usage is, to enjoin inferior officers from executing statutes; to hold them pecuniarily liable for acts done under void statutes; to enjoin citizens, and to make them liable, and in suits before them in which rights are asserted, based on unconstitutional law, to deny the rights in the judgment or decree that may be rendered. These methods are the least efficient for the early retirement of a statute from the *role* of law, and adherence to them exposes the public to the grave inconvenience and wrong incident to the absence for years of any means for certainly learning whether what purports to be a law, is law in fact.

What courts may declare acts of Congress unconstitutional? If it is of the essence of judicial duty, so to

[1] The Constitution, p. 263.

[2] They were Justices Field and Grier.

declare, as Chief Justice Marshall asserted in Marbury vs. Madison, it follows that any court, however humble, however few the men that compose it, and however unlearned, must sit in judgment on the acts of Congress that come before it for application, and if, in its opinion they are unconstitutional, it must declare them void. Occasionally judges of superior courts, scandalized by the spectacle of an ignorant justice of the peace, in some rustic neighborhood, undertaking to annul a federal statute, have intimated that judges of obscure courts should not presume to question the validity of statutes.[1] But extravagance of the judicial pretension to sit in judgment on the acts of Congress must always be a mere matter of degree. What more ridiculous than a court of common pleas of one unlearned man, declaring an act of congress void, unless it be a similar decision by a bucolic justice. The largest court in the country is composed of but nine judges, and usually acts are declared unconstitutional by but five of these, who are contradicted by the other four. The act may have been passed by the unanimous vote of more than four hundred members of the two houses and approved by the President on the advice of his attorney general and yet it can be nullified by a majority of one judge. And sometimes the five who nullify it do not agree as to what the defect of the statute is. One may think it violates this clause of the constitution, and another that; and in fact the act may be condemned for a flaw which but one man thinks he has discovered; for if A thinks it violates clause *m*, and B clause *n*, and C clause *o*, and D Clause *p*, and E clause *q*, and the five agree to brand it as void, is it not clear that the act is overturned on the judgment of one man?[2]

The rule is often laid down that the court should not denounce a law as constitutional, unless it is clearly so. "We proceed upon the rule" says Brewer, J., "often expressed in this court, that an act of Congress is to be accepted as constitutional unless on ex-

[1] Cf. Cooley Const. Lim. 230. In United States v. Sheve, 1 Baldwin 510, during the trial of a defendant for forging a note of the bank of the United States, his counsel undertook to convince the jury, as judge of the law as well as of the fact, that the act of Congress by which the bank was incorporated, was unconstitutional If juries are judges of the law, absurd as it seems, they have as good a right to pronounce on the constitutionality of a statute, as has a court. Cf. Baldwin, American Judiciary, p. 190.

[2] A county court may declare a state law a violation of the federal constitution; Lent vs. Tillson, 140 U. S. 316.

amination, it clearly appears to be in conflict with the provisions of the federal constitution."[1] "The opposition between the constitution and law should be such" said Marshall, C. J., "that the judge feels a clear and strong conviction of their incompatibility with each other."[2] Said Chief Justice Waite, "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger."[3]

A careful examination of the cases in which acts of congress have been pronounced unconstitutional negatives the actual observance by the courts of this rule. After Congress and the President have concluded that an act is constitutional, an investigator would have a singular mind that would feel a clear and strong conviction that they were wrong. The phrases of the constitution are vague and abstract. Some of them it is extremely difficult to harmonize. Even the standard of construction and interpretation is unsettled. Must we find out what the members of the federal convention meant? Or what the members of the ratifying state conventions meant? Or what the majorities of the adult males in the states meant? Or what the present people of the states would probably mean if they were adopting the constitution? There are several cases which have rejected the intentions of the adopters of the constitution as decisive of its present meaning. In Fort Leavenworth Railroad company vs. Lowe[4] it is boldly said that the framers of the constitution believed that "without the consent of the states the new government would not be able to acquire lands within them." We moderns have discovered their mistake!

A study of the opinions filed in different cases or in the same case, makes certitude as to the meaning of the contested portions of the constitution for a rational mind impossible. In the great cases, how skilful the arguments of the judges on both sides; how cogent the facts; how strong the cited authorities! Let one study the opinions in the Dred Scott Case, the Legal Tender Cases, the Income Tax Cases, the Insular Cases, and he will realize how futile

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[1] Fairbank vs. United States, 181 U. S. 283. Yet in this very case four judges dissented.

[2] Fletcher vs. Peck, 6 Cranch 128; Livingston vs. Darlington, 101 U. S. 407; Cf. Cooley Const. Lim. 252.

[3] Sinking Fund Cases, 99 U. S. 718; Powell vs. Pennsylvania, 127 U. S. 678.

[4] 114 U. S. 525 Cf. Dred Scott vs. Sanford, 19 Howard 393.

it is to expect any certainty, when so much can be said for each of the contending views. Let him further consider the veering of the court, now towards an affirmation, now toward a denial, of the validity of the statute. Let him note the lamentable contradiction between the decisions in respect to several transcendently important questions. Let him duly weigh the circumstance that a constitutional case is never decided by an unanimous court; that usually there are three, and very frequently four dissenters. How can any one outside of the court feel any certainty that the view of the six or the five was sounder than that of the three or the four, especially when the authority of the minority is fortified by that of the congress and the president that enacted the statute? Still more extraordinary is it that any judge who, being in the arena, is a party to the conflict within the court and who becomes directly impressed by the sentiments of his associates, should be willing to admit to others or even to pretend to himself, that he is sure that his version of the constitution is the correct one. The human mind abates somewhat of its confidence in itself when it perceives that other minds equally able, and sincere, and with equal opportunity to acquire the *data* for judgment, have reached opposite conclusions.

One of the canons laid down by Judge Cooley[1] as worthy of observance in deciding whether legislative acts are constitutional, is thus expressed, "Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid unless a decision upon that very point becomes necessary to the determination of the cause." This rule though supported by several decisions of state courts, it would be extremely difficult to justify. The inconvenience to the public of ignorance whether so-called laws are in fact laws, is so serious as exigently to dictate the very opposite rule. Instead of waiting until avoidance of the decision is impossible, courts should welcome the first opportunity to pronounce it. Their primary duty is towards the people. Sparing the susceptibilities of congress, preserving a ceremonial show of deference for that body, which is often not in fact felt, is not nearly so worthy an object as relieving the people from harassing and ruinous doubt concerning the law to which they must accommodate their conduct. In one notable instance at least[2] the Supreme Court has decided the unconstitutionality of an act of con-

[1] Const. Lim. 231.

[2] Dred Scott vs. Sandford, 19 Howard 393.

gress, when the solution of the problem before it, did not make such decision necessary.

Another rule is suggested by Judge Cooley,[1] for the regulation of the conduct of the courts in deciding act of legislative bodies unconstitutional, namely, that they should insist on the presence of a full bench. This doubtless, is a sane rule. The largest court is small in comparison with the law-making bodies, and there is something approaching the grotesque in a small body of men overriding the work of a larger body, unless, as seldom happens, the intellectual and moral character of the several components of the former is greatly and perceptibly superior to that of the components of the latter. When a circuit court of three judges or the supreme court of nine, is going to annul a statute passed by Congress and the President, it is fit that all the judges should be present. However but little is gained by the presence of all the judges, if in the end, a statute is overthrown by a bare majority of one or two. The rule should be expanded so as to require that a court should never pronounce the opinion of the Congress and the President as embodied in legislation, erroneous, until all its members had agreed in the judgment. The result of this simple rule would be materially to lessen the number of condemned statutes, and to free the subjects of the government from much of the harassing uncertainty respecting their rights and duties under the law, which now afflicts them, an object worthy of the anxious effort of statesman and jurist, business-man and scholar.

WILLIAM TRICKETT.

[1] Const. Lim. 230.

MOOT COURT.

BURROWS vs. R. R. Co.

Admission of Illegal Evidence—Requisites of a Valid Ordinance—Negligence per se—Ordinance Limiting Speed of Trains as Evidence of Negligence.

STATEMENT OF THE CASE.

An ordinance of the borough through which the railroad passed required the stationing of a flagman at a crossing and the slowing of the speed of trains to ten miles an hour. This ordinance was not recorded nor was it published. In an action by Burrows for damages to his wagon which was run into, in going over a crossing, by a train of defendant's going 15 miles an hour, it was shown there was no flagman at the crossing. This ordinance was put in evidence by the plaintiff. Verdict for plaintiff for $125. Motion for new trial.

Reed for the plaintiff.

1. A new trial will not be granted because of the admission of evidence which is clearly immaterial. Pepper & Lewis Digest of Decisions, Vol. 13, Column 22949.

The running of a train at the speed of 15 miles per hour over the crossing of the borough, as given in evidence in the present case, is entirely too great a rate of speed, and would constitute the railroad company liable for damages in the present case had the ordinance not been put in evidence, there being no contributory negligence on the part of plaintiff.

Phila. & Reading R. R. Co. v. Lewis, 75 Pa. 257; Hagan v. Railroad, 5 Phila. 179; Penna. R. R. Co. v. Lewis, 79 Pa. 33.

LaBar for the defendant.

The ordinance not being published or recorded was void. Aut May 23, 1893, P. & L. Col. 430; Lee v. Lewiset al., 7 Kulp 163; Trickett on Borough Law, Vol. 1, p. 134; Waln v. Phila., to use of Armstrong, 99 Pa. 330.

The speed of the train is not negligence per se. Lederman, et ux. v. R. R. 165 Pa. 118; Penna R. R. v. Lewis, 79 Pa. 33; Seifred v. R. R. 206 Pa. 339.

When illegal evidence has been admitted, a new trial should be granted. R. R. Co. v. Smith, 125 Pa. 265.

OPINION OF THE COURT.

SMITH, RALPH, J.:—The contentions of the defendant are (1) the ordinance is void, not having been published as prescribed by statute, and hence its admission in evidence is the admission of illegal evidence; (2) the refusal of the court to withdraw from the jury illegal evidence improperly admitted in the progress of the trial is ground for a new trial.

The question arises, admitting the evidence to have been admissable, would or ought it to have varied the issue of the cause? Would its probable effects on the minds of the jury have been to produce a verdict of guilty?

In Anderson vs. Railroad, 54 N. Y. 337 the court said that the reception of illegal evidence is presumptively injurious to the party objecting to its admission; but when the presumption is repelled and it is clear beyond rational doubt that no harm was done to the party objecting and the illegal evidence did not or would not affect the results, the error furnishes no ground for reversal. Troubat & Haly, Vol. 1., Sec. 774, lays down the rule that the admission of improper evidence whenever it may have injured a party is ground for a new trial though there was no exception. And in the cases cited under the same section it was held that the admission of immaterial evidence is not ground for a new trial—Simibroth v. Lehr, 5 Phila. 87; a new trial will not be granted where irrelevant testimony which may not have influenced the verdict has been received. Clark v. Vorce, 19 Wendell 232.

We believe that if injustice was the result of the verdict because of the admitted matter and the defence had no other redress than the medium of a new trial a point might be stretched in the defendant's favor but as to a mere technical difficulty when the verdict is consistent with the merits there should be no reversal.

The ordinance of said borough prohibiting the operation of a train within the limits of the borough at a rate of speed not exceeding ten miles an hour was not unreasonable and with further proof should not be ground for reversal. It did not relieve the plaintiff of the burden of showing himself free from contributory negligence Railroads are not negligent per se for omissions to comply with ordinances where trespassers are killed on their right of way. B. & O. Railroad Co. v. State, 82 Md. 497.

Trains may be run at a high rate of speed to reach their greatest utility, but in populous towns and cities the speed must be moderate. Under the evidence it is for the jury to say whether the train was run too fast. Lederman v. Railroad, 165 Pa. 118. Evidence that a city ordinance forbade trains to be run at a higher rate of speed than five miles an hour may be considered in ascertaining whether or not the train was being negligently run. but such ordinance in itself is no evidence of negligence. In Penna. R. R. Co. v. Lewis, 79 Pa. 33, there was no ordinance limiting the rate of running at that point. There was evidence that the train was running at a high rate of speed. It was held that whether the train was running at a rate of speed which was safe and prudent under the circumstances was for the jury. Lane v. Atlantic Works, 11 Mass. 136. In an action to recover for personal injuries alleged to be caused by iron falling from the defendant's truck while carelessly left standing on the street, the jury may consider, upon the question of the defndant's negligence, the fact that a city ordinance forbade trucks standing in the street.

From the line of cases, like to the one at bar, we have been able to find on the question of the admission of an ordinance in evidence the prevailing rule in Pennsylvania seems to be that an ordinance is admissable: however, in a number of other states the contrary rule is held and we think with reason. The ordinance is the mere expression of the opinion of

the council for the municipality. If the ordinance will have any effect whatever upon the jury in bringing about the verdict, and it undoubtedly would be an aid to them in determining what was reasonable, it should not be admitted.

We believe, however, even if the evidence was incompetent, irrelevant and immaterial, it was not such evidence as would have affected the verdict and warranted a new trial.

OPINION OF THE SUPREME COURT.

The ordinance requiring the stationing of a flagman at the crossing and forbidding a greater speed than ten miles per hour, was not recorded nor published. The act of April 3, 1851 requires the council of a borough to publish every ordinance in at least one newspaper and by not less than twelve advertisements "at least ten days before the same shall take effect." The ordinance does not yet have effect; Commonwealth v. Beaver Borough, 171 Pa. 542; Buchanan v. Beaver Borough, 171 Pa. 567. The penalties prescribed by it cannot be imposed. Its prohibitive virtue is in a state of suspense.

As the ordinance could not be directly employed as the proof of a duty, on the part of the railroad, in a proceeding to enforce the fine for a breach of it, it ought to follow that it cannot be indirectly employed as evidence of a duty, in a private litigation.

Had the ordinance been duly passed, recorded and published, it might have been put in evidence, to show the negligence of the defendant; that is, to show that impelling its cars at a greater speed than ten miles per hour, was a negligent act. It is not, we are informed, "*per se* evidence of negligence," Lederman v. Railroad, 165 Pa. 118, which, means probably, that the greater speed than the prescribed, is not, simply because it is greater, negligent: that is, though the rate violates the ordinance, it may not be negligent. The prescribed rate "may be taken into consideration by the jury with other evidence, in ascertaining whether" the speed was too high. But how? Because people will rely on the railroads' observing the ordinance, and then it would become negligent for it to exceed the limit? Or because the ordinance expresses the opinion of authoritative persons as to what is a safe speed? The case does not enlighten us. In Connor v. Traction Co., 173 Pa. 602, a collision between an east bound and a south bound passenger car, at a crossing, the ordinance gave the right of way to the south bound car when it was within forty feet of the crossing. The driver of the east bound car was killed. The widow of the deceased, alleged that the south bound car was more than forty feet from the crossing, and therefore had not the right of way. The Supreme court remark that failure to comply with such an ordinance is not necessarily negligence *per se*, it is merely evidence of negligence; but how is not explained. In Penna. Co. v. James, 81½ Pa. 194, an ordinance limiting the speed to five miles per hour, was put in evidence but the attention of the court was attracted simply to the question of the power of the city to enact it. The trial court says that the violation of the ordinance, in running twenty to thirty miles per hour, and the neglect to ring the bell, would be negligence, but whether simply violating the ordinance would be, is not intimated.

We have on former occasions indicated dissent from the view that an ordinance is receivable as evidence of negligence, in an action not founded on the ordinance and to which the borough or city is not a party. If the ordinance secured a *right* to individuals that the railroad should not violate it, the violation should give a cause of action to them whenerver, but for it, the accident would not have happened. But it does not do this. It is only some evidence of negligence. It can be such evidence only as it expresses the opinion of those who enact it, or who allow it to stand unrepealed. The reception of opinion evidence as to what is a proper speed is anomalous. Still more is the reception of an ordinance as the expression of this opinion, those who pass it not being called into court, nor sworn, nor subjected to examination. The practice of receiving such evidence ought to be abolished.

But what was put in evidence in this case was not an ordinance, but something which was merely on the way to become an ordinance. We are unwilling to so extend the rule which admits ordinances as to make it embrace inchoate acts of municipal legislation

Judgment reversed.

LOGAN vs. SHAFER.

Rescission of Contract for Sale of Personalty—Re-sale—Breach of Contract —Non-performance—Recovery of Part Payment—Damages.

STATEMENT OF THE CASE.

Logan contracted with Shafer on January 17th, 1905, to buy of Shafer 150 hogs at $5.00 per hundred weight.

They were to be weighed and delivered on February 1st, and then paid for.

Logan advanced $250.00 on account on January 24th.

Shafer was ready to deliver the hogs on February 1st, but Logan did not appear and claim, or pay for them.

Shafer kept them two weeks, when, finding another purchaser, he sold them for $250.00 more than Logan had agreed to pay.

Logan sues to get back the $250.00.

Barner for the plaintiff.

Where in a contract for the sale of personalty the vendee does not accept the goods, the vendor may consider the contract rescinded and resell the goods and recover from the vendee his damages. Guard vs. Taggert, 5 S. & R. 19; McCombs vs. McKennan, 2 W. & S. 216; Miller vs. Phillips, 31 Pa. 218.

The party rescinding the contract where there has been no delivery of goods must return the consideration in whole or in part which he has received under it. Beetem vs. Burkholder, 69 Pa. 249; Bush vs. Bender, 113 Pa. 94

McAlee for the defendant.

The payment of the purchase money was a condition precedent for title to pass.

OPINION OF THE COURT.

JOHNSON, J.:—In Cleveland and company vs. Sterret, 70 Pa.204, the defendants agreed "to deliver to the plaintiffs at their works at Mill Creek or on their platform at the railroad 240 barrels of oil" of the quality named etc., "any time betwen July 1st and December 1st" on the plaintiffs "giving ten days notice at his option;" the plaintiff to pay thirty-six cents per gallon, etc. $1,000 to be paid July 1st, $1,000 on August 1st, and the balance on delivery. It was held by the court that the defendants were to be the actors, and were to be ready to deliver the oil at one of the places named on December 1st, unless plaintiff by his option had demanded an earlier delivery. The plaintiff paid $2,000. Defendants not being ready to deliver on December 1st, the plaintiff might rescind and recover back the money he had paid. The defendants not being ready to comply with their contract could not demand the money from the plaintiff, nor recover damages for his refusal to receive the oil after the first of December.

In the present case it would seem that the defendant Shafer was entirely ready to deliver at the place named in the contract and at the appointed time; also the quantity, which by the contract, was to be measured by weight, had been duly ascertained by Shafer, thus taking the case out of Nesbit vs. Burry, 25 Pa. 208, and Cleveland vs. Sterret, supra.

Shafer did more . He kept the hogs two weeks, presumably awaiting Logan's appearance and claim. It can hardly be said that it was Shafer's duty to pilot the hogs about the country in search of Logan, or to go himself on a pilgrimage of discovery for the missing purchaser, nor could he be expected to keep the hogs forever, in hope Logan would come back; the contract is explicit and affords abundance of notice to Logan; Rowland vs. Lehigh Coal Co., 28 Pa. 215; Cleveland or Sterret, supra and Musselman vs. Stoner, 31 Pa. 265.

It seems clear to us that Logan, by his action rescinded the contract. Therefore Shafer could have brought an action for damages. He does not seem to have cared to pursue this course. Instead he keeps the $250 Logan advanced "on account." We do not understand by what authority he resolves himself into a Board of appraisers that may call upon this $250 advancement of this plaintiff to relieve his disappointment and injury in failing to dispose to a certain party certain valuable hogs. In truth, his pecuniary damage could hardly have reached his ultimate profit.

Looking at the case from another view-point; Shafer has seen fit to treat this whole transaction as "no sale" to Logan, (part payment will not vest the ownership in the vendee, Welsh vs. Bell, 32 Pa. 12.) Logan seems glad to do likewise. If this is so, how does the $250 become the property

of Shafer? It was to be used in a sale. It was to become the property of Shafer upon a consummated sale. There was no sale. Is it not the property of Logan?

We believe the $250 in question should be returned to Logan. If Shafer has a claim against a portion of it, or even all of it, he will find his remedy in a proper action at law.

Judgment for plaintiff.

OPINION OF THE SUPREME COURT.

The contract made January 17th did not pass the property in the hogs to Logan. They were to be weighed and paid for on February 1st, and then delivered. The ownership did not pass until these things were done. Thompson v. Franks, 37 Pa. 327; Nicholson vs. Taylor, 31 Pa. 128. The payment of the price did not cause it to pass; Nesbit vs. Burry, 25 Pa. 208. The second purchaser became the owner.

We are not required to consider whether, by the second sale, Shafer violated any right of Logan. He is not sued for a breach of contract and he could not be sued for conversion of or trespass on the hogs, as Logan's.

$250 were paid to Shafer, as a part of the price of the hogs. Shafer having sold them to another, cannot retain the money. If the failure of Logan to take and pay for the hogs at the time designated in the contract, was, as it doubtless was, a breach of it, he would be liable for actual damages. But, it does not appear that any such damages have been suffered. Shafer sold the hogs for $250 more than Logan had agreed to pay. The expense of keeping them two weeks, and other expense being deducted, there would probably still remain with Shafer a considerable gain from Logan's breach of his contract. If he were allowed to keep the $250 obtained from Logan, he would profit almost to the extent of $500 by Logan's breach.

Judgment affirmed.